No. 18,275

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND L. STOVER, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the Judgment of the United States District Court for the Northern District of California, Northern Division

Honorable Sherrill Halbert, Judge

APPELLANTS' REPLY BRIEF

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Subject Index

		Page
I	Introduction	1
II	Analysis of "Brief for the Appellee"	2
	A. Preliminary	2
	B. Comments on Points Urged in Brief for Appellee	3
	1. Table of Authorities	3
	2. Statement of the Case	3
	3. Specifications of Error	5
	4. Argument	6
III	Points Raised in Appellants' Opening Brief But Ignored in Brief for Appellee	8
	A. Man-Made Flood	8
	B. Concurrent Causation	11
	C. Congressional History	11
	D. Case History	12
	E. Because of, not in spite of, Federal Flood Control Works	13
	F. Constitutionality of Section 702c	13
IV	National Manufacturing Co. v. U. S.	14
V	Clark v. U. S.	19
VI	Floods or Flood Waters	21
VII	Kincaid v. U. S.—The Fuse-Plug Cases	22
VIII	Conclusion	26

Table of Authorities Cited

Cases

Pages

Beckley v. Reclamation Board (1962) 205 C.A. 2d 734.... 22

Clark v. U. S. (C.C.A. 9th, 1954) 218 F. 2d 446...3, 7, 19, 20, 26

Coates v. U. S. (1951) 181 F. 2d 816....................12, 19

Dalehite v. U. S. (1952) 346 U.S. 15....................18, 19

Indian Towing v. U. S. (1955) 350 U.S. 61..............18, 27

Kincaid v. U. S.:
35 F. 2d 235 (1929) 22, 23, 24
37 F. 2d 602 (1929) 23, 25
49 F. 2d 768 (1931) 23
285 U.S. 95 (1931) 23

National Manufacturing Co. v. U. S. (1954) 210 F. 2d 263
..................................5, 6, 7, 8, 9, 16, 18, 19, 26, 27

Rayonier v. U. S. (1957) 352 U.S. 215..................18, 27

U. S. v. Sponenbarger (1939) 84 L. Ed. 239.............. 13

Statutes

Flood Control Act of 1928:
Section 702 8
Section 701c 12
Section 702 A-12 12
Section 702c 2, 4, 5, 6, 10, 11, 12, 13, 16, 18, 22, 24, 26

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I

INTRODUCTION

This is a case of the collapse of levees caused by the Government forcing waters into the artificially leveed channel which waters nature would not have drained to the place where defective artificial levees burst. By this series of events the lands of the claimants became covered with water and their property damaged or destroyed.

Appellants respectfully urge that they should have been permitted to prove that this flooding of their lands was not a natural flood but a man-made flood.

The government contends that it is not liable, by virtue of Section 702c, for a government-made flood.

II

ANALYSIS OF "BRIEF FOR THE APPELLEE"

A. PRELIMINARY

The United States of America has filed a twenty-six page "Brief for the Appellee" with only seven pages of "Argument" in response to our seventy-five page "Appellants' Opening Brief." While we would quickly concede that the respective number of pages alone should not be significant, we do submit that nature of the case at bar warrants more than a cursory handling by the government of the United States unless, as appears from the "Brief for the Appellee", the Government is left with no real argument of substance for its position and there is no real basis in law to support the rulings of the Trial Court.

We shall therefore reply to each point set forth in the Government's "Brief for the Appellee" and then point out the numerous points of substance urged in "Appellants' Opening Brief" but utterly ignored in the Government's "Brief for the Appellee."

B. COMMENTS ON POINTS URGED IN BRIEF FOR APPELLEE

1. Table of Authorities

A glance at the "Table of Authorities" in the respective briefs reveals fifty-two cases cited in Appellants' Opening Brief and only four cases cited in the Government's "Brief for Appellee," two of which are strong cases against the position of the Government. Thus in this litigation the Government relies *wholly* on two cases—*Clark v. U.S.* (C.C.A. 9th, 1954) 218 F. 2d 446, and *National Manufacturing Co. v. U.S.* (C.C.A. 8th, 1954), 210 F. 2d 263, the force of which we will discuss fully later in this Reply Brief.

2. Statement of the Case

A. As to the Facts. (Brief for the Appellee, pp. 2-8.)

Under this heading the Government does not challenge Appellants' "Statement of the Case" (A.O.B. 2-7) but merely refers to "certain other pertinent facts which show the magnitude of the rainfall and streamflow in the Feather River basin during the critical month of December, 1955". (Brief for Appellee, p. 2.)

The Government here shows that there was a big storm. This we do not dispute. But was the magnitude of this rainfall and streamflow reasonably forseeable? The government does not contend it was not. The Trial Court refused to permit Appellants to prove that the amount of rainfall and the amount of streamflow was reasonably forseeable by the United States

Corps of Engineers, by the United States Weather Bureau, or by a reasonably prudent person under the same or similar circumstances. (A.O.B. p. 24 and R.T. 684:20-685:1.)

What the Government, and the Trial Court, say is that the Government can build a limited capacity flood control project which the Government knows will not contain waters reasonably to be expected to flow into the project, and when the inevitable happens, Section 702c immunizes them from the inevitable result of the conduct of the Government.

THIS WAS NOT AN "ACT OF GOD" FLOOD, AND NEITHER THE TRIAL COURT NOR THE GOVERNMENT SO CONTEND. THIS STORM WAS REASONABLY FORESEEABLE.

B. As to Procedure. (Brief for Appellee, pp. 6-8.)

Nothing in this section of the "Brief for Appellee" in any manner contributes to a reasonable decision on this Appeal.

C. As to Contentions. (Brief for Appellee, pp. 6-8.)

Here the Government has clearly set forth the respective contentions of the parties. Appellants contend that this was a man-made flood. The Government contends that it is not liable, under 702c, for a man-made flood.

The Government contends it is not liable under the Federal Tort Claims Act for a flood it negligently creates!

3. Specification of Errors. (Brief for Appellee, pp. 9-18.)

A. The Government asserts that Appellants are mistaken in stating that the Trial Court held Section 702c to be an immunity statute.

The Trial Court, in its "Memorandum and Order" dated April 23, 1962 (Cl. Tr. 75; A.O.B. 11):

> "It appears that Section 702c was, and is, *intended to save* the United States harmless *from liability* in cases involving natural floods, or flood waters, whether or not there is a concurrence of negligence with such flood waters."

"Intended to save harmless." "Immunity." Is there a difference? Is this not a rose by another name?

B. The Government urges, *solely* on the basis of the case of *National Manufacturing Co. v. U.S.* (1954) 210 F. 2d 263, that the Trial Court was correct in holding that proximate cause was not an issue in the case at bar.

C. The Government concedes that the Trial Court refused to permit Appellants to introduce any evidence on the issue of whether the flood here in question was a "man-made" or a "government-made" flood, and urges that the Trial Court correctly refused such evidence even though the Trial Court in its "Memorandum and Order" of April 23, 1962, specifically ruled that Section 702c would not render the Government "harmless" from "inundations of an artificial nature, solely caused by the instrumentalities of man." (Cl. Tr. 75.)

Appellants offered to prove, but the offers of proof were rejected by the Trial Court, that the claimants in these cases were damaged by a flood either solely caused by the negligence of the government or concurrently with acts of nature caused by the negligence of the government. (See A.O.B. pp. 18-24.)

When the Government collects rainfall and run-off into a container and transports that water twenty-five and forty miles from the natural drainage of that water, is it a proper use of the legal term "proximate cause" to say, when the container burst twenty-five miles and forty miles from the water's natural drainage, that *nature* caused the container to break? Or that the flooding of land from such activity was not *caused solely* by the acts of man in transporting water out of natural drainage in a limited container which became overloaded and burst solely because man tried to put more water in the container than it would hold? Would such a flood be a natural flood or a man-made flood?

The Trial Court said that even if you prove this, 702c renders the Government immune.

4. Argument. (Brief for the Appellee, pp. 18-25.)

The government's "Argument" consists of saying Appellants are wrong in contending that the only two cases the government relies on do not warrant a judgment in favor of the government, that the legislative history of Section 702c was "fully presented" to the Court in *Court v. U.S., supra* and in *National Mfg.*

Co. v. U.S., supra, when the fact is that the government presented its excerpts of the legislative history but not one word of legislative history was presented in these two cases by plaintiffs' counsel, that the *Atkinson* case (126 F.S. 406) is wrong because it recognizes the distinction between natural and man-made floods, and the *Aycrigg* case (No. 6299, N.D. Calif.) should be construed to support the government's position here because a private bill was necessary in a case which arose out of the 1937 floods (before the enactment of the Federal Tort Claims Act in 1946). All the Government really says is that the *Aycrigg* case required a private bill at a time when the only method by which one could sue the government for negligence was by means of a private bill. The legal effect of Sec. 702c was exactly the same in relation to the private bill in the *Aycrigg* case as in relation to the Federal Tort Claims Act in the cases at bar.

The Government's "Argument" ends with two interesting comments on page 24 of the "Brief for the Appellee." It says, after referring to the *Clark* case and *National Mfg.* case:

> "The decision here on appeal was based on these decisions, is equally correct . . ."

The Freudian equivocation—"equally correct"! May we respectfully query—equally incorrect?

The Government's argument ends with the limp argument that the *Clark* and *National Manufacturing* cases

> ". . . should not now be seriously questioned."

This argument for the perpetuation of erroneous concepts of law is the last gasp of a dying doctrine. When all else fails, when reasonable legal principles utterly destroy an erroneous authority, we then hear this argument.

Our plea to this Court is to reconsider the *Clark* case. We do seriously question the language of that case, and of the *National Manufacturing* case. We trust that the United States Court of Appeals is willing to listen to serious questions concerning cases which are urged to support the contention of the Government, as set forth in its "Conclusion" (Brief for the Appellee, p. 25) that by Section 702 the Congress of the United States *intended* innocent victims of the negligence of the Government to bear the full financial burden of the Government's misconduct.

III

POINTS RAISED IN APPELLANTS' OPENING BRIEF BUT IGNORED IN BRIEF FOR THE APPELLEE

A. MAN-MADE FLOOD

Appellants' Opening Brief repeatedly pointed out that Appellants not only urged, but offered to prove that the water on Appellants' lands was "from or by" a man-made flood. (A.O.B. pp. 6, 16, 17, 18-25.)

The Trial Court refused to permit Appellants to introduce evidence to prove that this was a man-made flood.

Appellants' Opening Brief, pages 66-67, points out that even one of the two cases relied on by the Government, the *National Manufacturing* case, acknowledges inferentially Appellants' position here when it said that there would be no liability on the United States where there is damage from or by a flood or flood waters "in spite of and notwithstanding federal flood control works," thereby inferring liability where there is flood damage from or by a flood or flood waters *because of* federal flood control works. The Government ignored this point.

Appellants' Opening Brief, pages 5 and 16-25, points out that there was a natural spillway at Hamilton Bend which allowed waters in excess of the leveed channel at Gum Tree and Nicolaus to drain off west into Butte Basin and thus not enter the leveed channel, that four times in the last 50 years but for this safety valve at Hamilton Bend, the levees at Gum Tree and Nicolaus would have been overloaded, and that this natural spillway or safety-valve at Hamilton Bend was closed in 1955 by the federal government, thus making the levee breaks inevitable. The Government ignored this point.

Appellants urged that the structure and location of the levee system was essential to a determination of whether this flood was a natural flood or a man-made flood, but the Trial Court refused to permit Appellants to prove where these levees were located! (A.O.B. 24.) The Trial Court thus prevented Appellants from proving that, from the plans, designs, construction, and location of these levees, this flood was

not a natural flood, but a man-made flood. The Government ignored this point.

We respectfully submit that Section 702c was not intended to immunize the government from liability from a man-made flood as distinct from a natural flood. It is no answer to merely say this was natural water as all water is natural. The Government transported natural water twenty-five to forty miles out of its natural drainage and the container broke at two weak spots. Does the fact that the container was a levee system rather than a convoy of trucks change the basic fact that water was not where nature would have put it, and that the *cause* of the damage was man's transportation and man's defective container? If a tank on a truck transporting the same water to the same locations out of natural drainage had sprung a leak and the water thus escaping had damaged property, would any Court say Section 702c immunized the Government from tort liability under the Federal Tort Claims Act?

We suggest that the reason the Government ignores these points is that it recognizes and cannot get any Government attorney to say, that Section 702c immunizes the Government from liability "from or by" man-made floods.

Appellants respectfully ask the right to prove that the damage to their property was "from or by" man-made floods.

B. CONCURRENT CAUSATION

Appellants' Opening Brief at pages 67-69 specifically pointed out that normal rules of concurrent causation apply and that an Act of God does not excuse negligent conduct of man. The Trial Court twisted this basic rule of liability by saying that, despite the normal rule that Act of God must be the *sole* cause of damage before it constitutes a defense, in this case he would hold a new and novel (and frightening!) rule to exist that man is liable only if his conduct is the *sole* cause of damage, and that man (the Government) is exempt if God is his co-tortfeasor.

The Government ignores this point.

C. CONGRESSIONAL HISTORY

Appellants' Opening Brief, page 37, specifically points out that a careful examination of the Congressional History of the Flood Control Act of 1928, including Section 702c, reveals that the term "negligence" was never used and the concept of negligence or tort was never alluded to. The Government ignores this point.

Appellants' Opening Brief, pages 37-39, specifically points out that flood control was referred to in the Congressional debates while considering the Federal Tort Claims Act, and that the only reasonable inference from this Congressional History is that negligent flood control is actionable. The Government ignores this point.

Appellants' Opening Brief, page 66, specifically points out that Section 702c does not say that the United States is not liable for damages "due to the construction works", although that phrase is contained in the hold-harmless clause in both Section 701c and 702 A-12, and that under accepted rules of statutory construction, different phrases in the same chapter of the United States Code should be construed to have different meanings. The Government ignores this point.

D. CASE HISTORY

Appellants' Opening Brief, page 40, specifically cites eight cases which have mentioned Section 702c and specifically requested the United States Attorney to state whether he knows any additional cases which refer to Section 702c. The Government ignores this point.

Appellants' Opening Brief, pages 55-65, cites and discusses eight cases in which the Courts of the United States of America have recognized the liability of the United States for flood damage. The Government ignores this point except as to the *Atkinson* and *Aycrigg* cases.

Appellants' Opening Brief, pages 60-63, cites and discusses the case of *Coates v. U.S.* (1951) 181 F. 2d 816 which quotes from Congressional Committee reports and from Law Review articles in its discussion of non-negligent flood control activities of the federal government from which the only reasonable inference

is that the Court of Appeals, Eighth Circuit recognized that negligent flood control by the federal Government would give rise to a cause of action under the Federal Tort Claims Act. The Government ignores this case and ignores the point.

E. BECAUSE OF, NOT IN SPITE OF, FEDERAL FLOOD CONTROL WORKS

Appellants' Opening Brief, pages 66-67, pointed out that both the cases of *U.S. v. Sponenbarger* (1939) 84 L. Ed. 239 and *National Manufacturing Co. v. U.S.* (1954) 210 F. 2d 263 recognize liability on the part of the Federal Government for flood damage *because of* federal flood control works. The Government ignored the *Sponenbarger* case and ignored this point.

F. CONSTITUTIONALITY OF SECTION 702c

Appellants' Opening Brief, pages 69-74, fully discussed, with numerous citations, the point that the interpretation of Section 702c urged by the Trial Court would render the statute unconstitutional.

The Government did not challenge or answer Appellants' authorities—it ignored them.

While the Government has chosen to ignore the fifty-two cases cited by Appellants in support of their arguments, we will not ignore, but will reply to all the cases cited by the Government as supporting its argument—all two of them.

IV

NATIONAL MANUFACTURING COMPANY v. U. S. (1954) 210 F. 2d 263

One of the two cases relied on by the Government in support of its immunity theory is the *National Manufacturing Co.* case.

Property of many plaintiffs was damaged or destroyed by flood waters of the Kansas River in 1951. The Federal Government had constructed flood control works along the Kansas River and through variout governmental agencies disseminated information and predictions relating to flooding. The flood waters of the Kansas River rose, overflowed the levees, and flooded sections of Kansas City and adjacent lowlands where plaintiffs' properties were damaged.

There was no contention, as in the cases at bar, that conduct of the Government in fact *caused* the flood.

There was no contention as in the cases at bar, that the Government negligently planned, designed, constructed, maintained, or operated the flood control works.

There was no contention, as in the cases at bar, that the Government by the exercise of ordinary care could have prevented the waters from flooding plaintiffs' lands.

There was no contention, as in the cases at bar, that the levees were defective and collapsed because of negligent construction.

There was no contention, as in the cases at bar, of bad levees.

There was no contention, as in the cases at bar, that the damages occurred *because of,* and not in spite of the flood control works.

There was no contention, as in the cases at bar, of the Government diverting water out of natural drainage to the place of the damage.

There was no contention, as in the cases at bar, that the flood was a man-made flood.

What was, and what was not contended is clearly stated by the Court in its opinion (210 F. 2d at 269) in these words:

> "It was not charged in either of the complaints here that the United States was liable to any of the plaintiffs because the Kansas River overflowed the banks, levees and works within which it was normally confined, but the allegations of the complaint in each of the consolidated cases were limited to the effect that the United States became liable because the Weather Bureau and other federal agencies (1) negligently assured the plaintiffs immediately prior to the flood that the river would not overflow and (2) negligently omitted and failed to give the plaintiffs notice and warning of the impending overflow in time for them to remove their movable property from the flood area. In the *Shipley* case the plaintiff has relied on the second claim.
>
> The gravamen of the plaintiffs' cases was that the Federal Tort Claims Act should be so interpreted as to impose responsibility upon the United States for flood damage to plaintiffs' movable property in these cases because, as alleged, the United

States was negligent in making or withholding Kansas river stage and flood forecasts."

The Court held that the Government is not liable under the Federal Tort Claims Act for the negligence charged, which was solely negligent assurances of safety and negligent dissemination of flood forecasts. The cases at bar do no include similar contentions. There was nothing in the record of the *National Manufacturing* case to indicate that the flood there was anything but a natural flood and not a man-made flood. The frequent references to "Act of God" disasters in the opinion of the Court appear justified because no one contended to the contrary. Thus we feel the decision in the *National Manufacturing* case is consistent with our view of the meaning of Section 702c that there is no liability for damages occurring solely as a result of a natural flood.

However, the *National Manufacturing* case goes much farther than necessary and, to the delight of the Government, uses language which it finds comforting in saying that Section 702c bars recovery even where negligence of the Government is a proximate cause of damage "from or by floods or flood waters." (210 F. 2d at page 271.)

Considerable reference is made in the *National Manufacturing* case to portions of Congressional History submitted by the Government, and left unchallenged. In the cases at bar we have submitted considerable Congressional History showing that the contentions, and the conclusions in the *National Manufacturing* case were incorrect in two respects.

(1) The contention that there was a Congressional Policy of non-liability for indemnification of flood victims where the damage occurred *because* of negligent flood control is not correct. The language urged by the Government has been applied *only* in cases of natural floods, and has not been applied where negligent engineering on flood control works proximately caused the flooding of plaintiff's lands. This is what occurred in the *Aycrigg* case, when negligent construction of a levee near Marysville caused a collapse of the levee in the 1937 floods, and Congress authorized the litigation against the federal government for a case in which the damage occurred nine years before the Federal Tort Claims Act became law. The waters in the *Aycrigg* case were of the same character as the waters in the cases at bar as they were from the same leveed channel about five miles above the Gum Tree break. Liability followed in the *Aycrigg* case because the damage to plaintiffs' property was from a man-made flood.

(2) The Congressional History of Section 702c does not refer to the terms "negligence" or "tort liability" and despite our flat assertion on page 37 of Appellant's Opening Brief, the government has not been able to quote a single word from the Congressional Record which in any way tempers our assertion. There is nothing in the Congressional Record to justify the contention of the Government that 702c was meant to bar liability for negligent construction of flood control levees.

We submit that the language in the *National Manufacturing* case which the Government deems most helpful to its case is no longer the law of this land as it reflects the now rejected concepts of the case of *Dalehite v. US* (1952) 346 US 15 to the effect that the Federal Tort Claims Act "did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights", a concept squarely rejected in the cases of *Indian Towing v. US* (1955) 350 US 61, and *Rayonier v. US* (1957) 352 US 215 wherein the Supreme Court said:

> ". . . the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

The language in the *National Manufacturing* case at page 275 rejecting the concept of damages caused by *negligent* flood control must be deemed no longer the law as it specifically held that the Federal Tort Claims Act was not enacted to "visit the government with novel and unprecedented liabilities."

Thus, the basic rationale of the *National Manufacturing* case upon which the Government, and to a lesser extent the Trial Court here, relied, is simply not the law.

Is it not significant that the Government in its "Brief for the Appellee" utterly ignored this point even though in our Opening Brief, pages 41, 42 and 43 we had so fully pointed this out?

We further submit that the language in the *National Manufacturing* case should not be construed to mean

that that Court was of the opinion that there was immunity from damages caused by negligent construction of flood control works as this same Court, in fact two of the same three Justices (Sanborn and Woodrough), participated in the case of *Coates v. US* (1951) 181 F. 2d 816 in which the Court recognized the liability of the United States for damages resulting from negligent construction or maintenance of a flood control project.

We respectfully submit that the *National Manufacturing* case cannot be deemed persuasive authority because it did not involve the construction of bad levees, and reflected the now rejected thinking of the *Dalehite* case.

V

CLARK v. U. S. (1954) 218 F. 2d 446

The only other case upon which the Government, and the Trial Court, rely in support of their position in the cases at bar is the case of *Clark v. US, supra.*

We recognize that this case was decided by the Court to which we now appeal.

In the *Clark* case the Trial Court took evidence on the factual issue of negligence and made a specific finding of no negligence on the part of anyone. The Trial Court in the case at bar refused to take evidence on the factual issue of negligence.

Can we say that either the Trial Court or the Court of Appeals in the *Clark* case would have ruled the same had there been a finding of negligence by the Corps of Engineers in the construction or maintenance of the embankment which failed? We submit that a

careful reading of the opinion of this Court would support the interpretation that this point was not specifically covered. The question of negligence in construction and maintenance of the embankment was disposed of by this Court on the basis that the Trial Court found no negligence, and that the railroads were not federal agencies within the purview of the Federal Tort Claims Act even though "seized" by the Government during a labor dispute. This Court, in the *Clark* case *did not say* that the Government would not be liable for damage resulting, or proximately caused, by negligent design or construction of a levee.

All the reference to "non-liability" of the United States was with reference to the charge of negligent flood fighting by the Corps of Engineers and not to construction or maintenance. There was a specific finding by the Trial Court that the Corps of Engineers was not negligent. The language of this Court on page 452 of 218 F. 2d, in the *Clark* case to the effect that

> "The provision of 33 USCA Section 702c barring liability 'from or by floods or flood waters' expresses a policy that any federal aid to the local authorities in charge of flood control shall be conditioned upon federal non-liability."

we respectfully submit is not warranted by the Congressional History, the case law on the subject of damages resulting from flooding, and by basic principles of the law of torts. If this language is confined in its application to the narrow point then under discussion in the *Clark* case—fighting a natural flood—little harm is done. The *Clark* case did not involve a man-made flood.

But, we respectfully submit, such language should not be applied to a case in which the proximate cause of the damage is negligent design and negligent construction of levees which if reasonably designed and constructed would not have failed.

All Appellants here are urging is that this Court declare that the Government is required, under our principles of law, to govern in the manner of a reasonable man, and that when the government conducts itself in the manner of an unreasonable man it should be held liable just as a private individual. This is the spirit of democracy, for to permit the government to govern in a manner less than reasonable is the very antithesis of our system of government.

Is that a frightening thought? Is that an unreasonable request?

VI

FLOODS OR FLOOD WATERS

The Government seems mesmerized by the phrase "flood or flood waters." Few words have but a single meaning. The Trial Court simply decided that there was a lot of water. We do not believe Congress meant merely "a lot of water", but rather water running wild. The water, before the break was not running wild, but was flowing in the leveed channel.

The Trial Court in the case at bar ruled that waters confined by the leveed channel were "flood waters." (204 FS at 483.)

Subsequent to the Trial Court opinion in the case at bar a well reasoned opinion was handed down in the case of *Beckley v. Reclamation Board* (1962) 205 CA 2d 734, in which the District Court of Appeal of the State of California came to the opposite conclusion, and ruled that waters confined by levees are not "flood waters" on the basis that flood waters retain their character as flood waters *only* while vagrant, i.e., "flowing wild" over the country.

We submit that the reasoning of the *Beckley* case, *supra*, is reasonable and persuasive and that waters between the levees should not be deemed "flood waters" as that phrase is used in Section 702c.

However, regardless of this point, we respectfully submit that the statute should not be construed to mean immunity in this case just because the statute used the words "flood or flood waters" where, as here, the cause of the water damaging plaintiffs' property was the collapse of a levee.

If a statute stated that "no liability shall attach to the United States for damage from or by wild animals" would such a statute be construed to create imunity or "non-liability" for injury by wild animals escaping from a Government zoo? We think not.

VII

KINCAID v. U. S.—THE "FUSE-PLUG" CASES

The "Brief for the Appellee' in the Appendix, page x, cites the case of *Kincaid v. U.S.* (1929) 35 F. 2d 235 as authority for the proposition that Section 702c was

intended "to put . . . beyond argument" the point that the Federal Government will not pay for flood damage.

A careful reading of this case, and the other reported decisions of the same case, we believe, lend much more support to the propositions we here urge than to the position of the Government.

The cases of *Kincaid v. U.S.* are reported as follows:

35 F. 2d 235 (1929);
37 F 2d 602 (1929);
49 F. 2d 768 (1931);
285 US 95 (1931).

These cases are known as the "fuse-plug" cases because they involved the rights of landowners in floodways on the Mississippi River which would become flooded from time to time in the event of high water on the Mississippi River. The levees of the Mississippi were protected from the problem in the cases at bar, as rather than forcing more water into the leveed channel than the levees would hold, the levees contained a section of lower levee made of less resistant soil so that when the water reached the design level, the main levee at that point would break and the excess waters would be diverted through training levees and thus relieve the pressure on the main leveed channel.

The Government claimed it had the right to flood the lands of those plaintiffs, and that the landowners so flooded had no cause of action for damages. After long litigation the Supreme Court, while holding that the landowners could not enjoin the construction of the flood control project, said:

> "We assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainants' land constitutes a taking of it." (285 U.S. 95 at 103)

In the case at bar the Government built a project which it knew would have drained into it waters in excess of its capacity, but, in 1955, they closed the natural spillway, and left no "fuse-plug" designed to relieve the pressure. Thus, the weak spots on the levee became fuse-plugs and burst when water in excess of capacity drained into the project. This was inevitable. It was inherent in the project that this would happen. In a sense this was intentional, although the location of the fuse-plug was left to chance. The Government knew this would happen. The damage here was a direct result of the plan, design, and construction of the project.

The Trial Court discussed Section 702c in the *Kincaid* case (35 F 2d 235 at 245 and 246) and did *not* say this section created immunity but rather said, after asserting liability:

> "One cannot help but be impressed that the act as finally passed was an unskilled compromise, first, between those claiming that the state should bear a portion of the burden as against others insisting that the government pay the whole cost; and, secondly, those demanding that all injury suffered by property owners in the floodways should be compensated, while others contended that the government should not be made responsible for anything except property actually taken

> and to be occupied by the levees and other work contemplated by the project."

"An unskilled compromise." So said the Court. This does not sound like a firm policy of Congress to assert non-liability for damage because of, not in spite of, the flood control project.

It could well be argued that the cases at bar are very similar to the fuse-plug levee cases in that it was inevitable that "additional destructive waters" would pass over plaintiffs' lands by reason of diversions from the main channel of the Feather through the weakest spots in the levees when the levees became overloaded *as the Government knew would happen.* The weakest spots in the levees were inadvertent fuse-plugs.

The breaking of the levees on the Feather were inherent in the plan and design of the project, as the Government knew water in excess of capacity would drain into the project, but the locations of the breaks were left to chance rather than to orderly plan as in the case of the fuse-plug levees.

The opinion in 37 F. 2d 602 contains these thoughtful words:

At page 605:

> "Those within the floodway will live under a constant menace, for no one can tell in what years meteorological conditions will require the use of their lands for the purpose intended by the plan; i.e., a floodway."

And further at page 605:

> "However, as pointed out in the former opinion in this case, there is no escape from the proposi-

tion that the complainant's property, and that of all others similarly situated, will be, by express design of the plan, compelled to bear the whole burden whenever the necessity arises."

And at page 607:

> "But when the government departed from the policy of building levees and other public works for the purpose of commerce and navigation alone, and expressly entered the field of controlling floods for the protection and reclamation of private lands, then it became engaged in activities which make it responsible for the invasion of private rights. It will not be assumed that Congress intended to violate the Fifth Amendment to the Constitution by taking private property for public purposes without just compensation."

And at page 607:

> ". . . mere size and magnitude of the condition with which we are dealing cannot alter the principle."

VIII

CONCLUSION

Appellants respectfully submit that Section 702c does not bar a cause of action based upon proof of a man-made flood caused by the negligence of the Government in the plan, design, construction, maintenance or operation of a flood control project.

The Government is in the untenable position of relying on two cases (*National Manufacturing* and *Clark*) for a proposition that the Government is not

liable for a Government-made flood when neither of those cases involved Government-made floods, and the language relied upon by the Government in those cases has been rejected by the United States Supreme Court in the *Indian Towing* and *Rayonier* cases, both *supra.*

In neither the *National Manufacturing* case nor the *Clark* case did the conduct of the Government contribute to *causing* the water to flow upon those plaintiffs' lands.

In the case at bar the conduct of the Government was the sole proximate cause of water flowing onto plaintiff's lands.

Here, the flood was *caused by the Government.* Significantly the Government does not dispute this! The Government merely wants to prevent us from proving it.

Can the Government *cause* a flood and then claim "non-liability" because it is a flood?

Is this not somewhat like the small boy who killed his Mother and killed his Father and then pleaded for mercy because he was an orphan?

Dated, June 28, 1963.

Respectfully submitted,
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